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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 59

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN,
Appellant,
v.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The National Automobile Transporters Association of Detroit, Michigan, Intervening Defendant in the proceeding in the United States District Court for the Northern District of Illinois, Eastern Division, appeals to the Supreme Court of the United States from the final judgment and order entered in this action on August 20, 1965. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court is reported at 244 F. Supp. 955 (adv. sheets), and copies of the opinion and judgment are attached to the Jurisdictional Statement of the American Trucking Associations, Inc. et al., as Appendix A of that Statement. A copy of the Interstate Commerce Commission's report and order in *Substituted Service—Piggyback,* 322 I.C.C. 301, is attached to the Jurisdictional Statement of the American Trucking Associations, Inc., et al., as Appendix C of that Statement. In the Appendix to that Statement (hereinafter referred to as "Appendix") and in references herein, the pagination of the official Commission report is used.

JURISDICTION

This suit was brought under 28 U.S.C. §1336 to enjoin and set aside in part the report and order of the Commission. (Appendix C) The judgment of the District Court was entered on August 20, 1965 and notice of appeal was filed by this Appellant in that court on October 25, 1965. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. §§1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States v. Drum,* 368 U.S. 370 (1962); *American Trucking Associations, Inc. v. United States,* 364 U.S. 1 (1960); *Frozen Food Express, Inc. v. United States,* 351 U.S. 40 (1956).

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding §§1, 301, 901 and 1001; and Sections 2, 3(1) and 216(c) of the Interstate Commerce Act, 49 U.S.C. §§2, 3(1), 316(c), are set forth verbatim in Appendix B.

QUESTIONS PRESENTED

1. Did the District Court err in holding that Rules 2 and 3, and Rule 5 (insofar as Rule 5 relates to open-tariff TOFC service, 49 C. F. R. 500.2, 500.3, 500.5), issued by the Commission in Ex Parte No. 230, *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, are not authorized by Sections 2 and 3 of the Interstate Commerce Act, 49 U.S.C. §§2 and 3?

2. Did the District Court err in holding that Rules 2 and 3, and Rule 5 (insofar as Rule 5 relates to open-tariff TOFC service), violate the internal structure of the Interstate Commerce Act and are specifically forbidden by the provisions of Sections 216(c), 402(a)(5), 410(a)(1) and 410(c), 49 U.S.C. §§316(c), 1002(a)(5), 1010(a)(1) and 1010(c)?

3. Did the District Court err in setting aside the Commission's report and order insofar as it issued and prescribed Rules 2 and 3?

STATEMENT

On June 29, 1962, the Interstate Commerce Commission, on its own motion, issued a notice of proposed rule-making instituting an investigation into trailer-on-flatcar or piggyback service. The stated purposes of the investigation were:

> ". . . ascertaining and determining, in the light of the national transportation policy, and the provisions of the Interstate Commerce Act, the desirability, feasibility, and lawfulness of the operational practices, services, and facilities provided and utilized by or for rail, motor, and water carriers, express companies and freight forwarders subject to the Act, and of encouraging the participation in and the expansion of coordinated service by all such carriers, and of taking such other and further action as the facts and circumstances may justify or require."

The notice listed certain specific issues, among others, to be considered and determined, and named all railroads, motor carriers, water carriers, express companies and freight forwarders of property operating in interstate or foreign commerce, subject to the Interstate Commerce Act, as respondents. A prehearing conference was held October 9, 1962, at which proposed rules (reproduced at 322 I.C.C. 301, 406-410, Appendix C) were distributed. No oral hearings were held, but opportunity was given to all parties to file representations, verified statements, and reply statements, which numerous parties did.

In a report and recommended order served August 23, 1963, two hearing examiners proposed the adoption of certain rules (reproduced at 322 I.C.C. 301, 410-413, Appendix

C). In its report and order, the Commision promulgated eight rules intended to regulate trailer-on-flatcar service. (322 I.C.C. 301, 413-416; 49 C.F.R. 500.1 to 500.8) For convenience, the rules were simply referred to as Rules 1 through 8 in the District Court's opinion and will be so designated here.

On complaint, the District Court set aside the Commission's report and order insofar as it prescribed Rules 2 and 3, the "open-tariff" rules, and entered its judgment on August 20, 1965.

THE QUESTIONS ARE SUBSTANTIAL

1. The questions presented upon this appeal—involving the validity of certain rules promulgated by the Interstate Commerce Commission relating to trailer-on-flatcar (TOFC) service—are of great importance to the national transportation system in general and to Appellant National Automobile Transporters Association in particular. Transportation of loaded highway trailers on railroad flatcars is not a new development, but TOFC service did not flourish until the last decade. A majority of the Commission called piggyback service "probably the most significant recent development in transportation" (322 I.C.C. 301, 303) and described the growth of piggyback service in the five years preceding the report as "explosive" (322 I.C.C. 301, 305). In his dissenting opinion, Vice Chairman Webb declared that "piggybacking is the brightest star in the transportation firmament." 322 I.C.C. 301, 386. This particular proceeding is of singular importance because it constitutes the Interstate Commerce Commission's first general investigation of piggyback service. Here, for the first time, the Commission examined every aspect of TOFC

operations and re-examined existing precedents and practices on the basis of a factual record.

The primary issue in this appeal is the validity of Rules 2 and 3 promulgated by the Commission. Rule 2 and the essential part of Rule 3 are set out in full later in this Statement, but the essence of these Rules is that they require a railroad offering TOFC service on an open-tariff basis to make that service available on the same terms without discrimination to motor carriers acting in that capacity in hauling freight and they authorize the motor carriers to substitute the rail TOFC service for all or a portion of their authorized highway transportation. The Court below set aside the Commission's report and order insofar as they prescribed Rules 2 and 3, holding that these Rules are not authorized by specific provisions of the Interstate Commerce Act, are in violation of the internal structure of the Act, and are specifically forbidden by Part IV of the Act dealing with freight forwarders.

The Rules struck down by the District Court are of crucial importance to this Association because of the type of operating authority issued to the Association members by the Commission. These members are motor carriers, both common and contract, who are primarily engaged in the transportation of motor vehicle traffic under grants of authority by the Interstate Commerce Commission. In this one area of motor carrier transportation, carriers originating motor vehicle traffic at factory or assembly points must hold what is called "initial movement" authority in order to perform such transportation. Any movement of motor vehicle traffic other than from a point of manufacture or assembly requires possession of what is known as "secondary movement" authority. *Administrative Ruling No. 75; Classification of Motor Carriers of Property,* 2 M.C.C. 703; *Clark—Extension of Operations,* 16 M.C.C. 535; *Associa-*

ted Transports, Inc—Common Carrier Application, 26 M. C.C. 789; *Complete Auto Transit, Inc.—Extension—St. Louis,* 12 M.C.C. 365; *Dealers Transport Co., Inc.—Common Carrier Application,* 16 M.C.C. 31; *Complete Auto Transit, Inc.—Extension of Operations,* 22 M.C.C. 301; *Anchor Motor Freight, New York Corp., Contract Carrier Application,* 41 M.C.C. 132; *Commercial Carriers, Inc.—Extension—Automobile Bodies,* 46 M.C.C. 826.

With the development of TOFC service it became either mandatory or advisable in many instances for motor carriers of automobile traffic to participate with rail carriers in TOFC movement of this traffic. It thus became necessary to determine the nature of this coordinated service—if it constituted a through route, joint rate situation, the motor carrier would require initial movement authority in some instances and secondary movement authority in all instances. If it constituted a mere substitution of rail service for a portion of the transportation undertaking, a motor carrier with initial movement authority originating traffic at point of manufacture or assembly could participate in TOFC movements without the necessity of holding secondary movement authority.

The nature of this coordinated service was the subject of two separate proceedings before the Commission—one involving a Petition for Declaratory Order filed by this Association, assigned Docket MC-C-3024, one an investigation of an operation by a contract carrier member of the Association who was utilizing the Plan III TOFC service of a rail carrier as a shipper, assigned Docket MC-C-3077. These proceedings led to separate hearings and separate Examiner's reports, but the two dockets were consolidated by Division 1 of the Commission and eventually the Commission determined that the issues involved were of general importance and set the joint proceeding for oral argument before the Commission.

These proceedings culminated in the issuance of a report by the full Commission on October 15, 1962, a report which to this date has never been judicially reviewed. In the Declaratory Order proceeding, the Commission found that motor carriers of automobile traffic lawfully could substitute rail TOFC service for a portion of their motor carrier highway service without thereby creating a joint line situation which would necessitate possession of secondary movement authority. The Commission dismissed the investigation proceeding with suggested guidelines as to how motor carriers lawfully could substitute rail TOFC service for a portion of their contract carrier undertaking. The Commission made it clear, however, that its findings and conclusions were without prejudice to any findings and conclusions which might be reached in *Ex Parte No. 230.*

The Rules promulgated by the Commission in *Ex Parte No. 230* were consistent with their findings and conclusions in the earlier proceedings, but the District Court would strike these Rules down. If the District Court's Order is upheld, then motor carriers of automobiles cannot lawfully participate in TOFC service without creating a joint line situation. This raises all the problems discussed above and discourages coordinated motor-rail service. Both the motor carriers of automobiles and the shipping public would be adversely affected by such a decision.

2. As previously indicated, the primary issue in this appeal is the validity of Rules 2 and 3 promulgated by the Commission. The essential part of these Rules is as follows:

> 500.2 *Availability to all of TOFC service*—TOFC service, if offered by a rail carrier through its open-tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing

for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

500.3 *Use of open-tariff TOFC service by motor and water carriers in the performance of economically regulated transportation*—(a) Except as otherwise may be prohibited by these rules, motor common and contract carriers, water common and contract carriers, and freight forwarders may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier.

These Rules are based upon the Commission's premise "that all persons desiring to use TOFC service should be able to do so with the charges for the same service being equal to all users, whether they be motor or water carriers, freight forwarders, or private shippers." 322 I.C.C. 301, 319. This premise stems from the nature of the common carrier status itself—common carriers are under a duty to serve all the public on equal terms. The District Court acknowledged this common carrier duty to serve all on equal terms when it said that "the Rules are invalid as in conflict with the Act * * * if the congressional enactment is read to excuse the railroads from a duty to serve motor carriers equally with ordinary shippers." (Appendix, Page 34)

Having recognized this duty of railroads as common carriers, the Court erred in requiring the citation of specific provisions of the Act explicitly authorizing Rules 2 and 3. Instead, the Court should have demanded that it be shown some provision expressly exempting railroads from this acknowledged duty.

The Court concluded that the Commission relied upon Section 2 of the Act in promulgating Rules 2 and 3, be-

cause the section of the Commission's report dealing with these Rules refers specifically only to Section 2. The Court should have referred to 322 I.C.C. 301, 324, where the Commission set out the statutory authority for all of its prescribed rules. There the Commission rejected the same argument made in the District Court—that some of the prescribed rules, particularly those that "may be said to implement the broad provisions of existing legislation," were illegal. The Commission answered this argument as follows:

> "Under Parts II, III and IV of the act, we are given a general rule-making power by Sections 204(a)(6), 304(a) and 403(a), respectively; and in Section 12 we are 'authorized and directed to execute and enforce' the provisions of Part I. The Courts have recognized our rule-making authority. See, for example, *Assigned Car Cases*, 274 U.S. 564, 575 et seq. (1927) which arose under what is now Part I of the act; *American Trucking Assns. v. U.S.*, 344 U.S. 298, 308-313 (1953), which arose under Part II; *United States v. Pennsylvania R. Co.*, 323 U.S. 612, 616 (1945) in which the Supreme Court pointed out that the act since its inception
>
> > 'has contained broad language to indicate the scope of the law. The very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms. Congress has, in general, left the contents of these terms to be spelled out in particular cases by administrative and judicial action, and in the light of the Congressional purpose to foster an efficient and a fair national transportation system.'" 322 I.C.C. 301, 324.

Thus, the Commission specifically relied upon its broad rule-making authority in promulgating Rules 2 and 3. The Court rejected reliance on Section 12 of the Act because

"the Rules in question here must stand or fall with the interpretation of the Act itself, regardless of all the circumstances in the transportation industry." (Appendix, Page 34) Nevertheless, the Court recognized that Rules 2 and 3 are valid under Section 12 if the Commission's interpretation of the Act is correct. Appellant submits that Rules 2 and 3 are consistent with the general structure of the Act and are authorized by Sections 2 and 3 as well as by Section 12 of the Act.

The Court below admitted that Sections 2 and 3 are plainly complementary and to be read *in pari materia,* but said that Section 2 deals only with discrimination in rates and that Section 3 is inapplicable because of its proviso. The Court rejected as "inconclusive" the legislative history of this proviso. This history shows that the proviso was intended to safeguard the *rates* of other carriers against claims that they were unduly prejudiced to the traffic of the rail carrier. When Sections 2 and 3 are read in the context of the Act as a whole and with knowledge of the legislative history of these sections, they provide ample authority for the issuance of Rules 2 and 3. The Court's listing of "practical problems" and "anomalies" that would arise under the Commission's interpretation of the Act (Appendix, pages 37-40) ignores reality. If the Commission has the power to promulgate the Rules, it certainly has the power to control abuses of them. In any event, the practical problems in administering rules and regulations promulgated by an agency are more properly the concern of the agency itself than of the court of law which reviews the question of the agency's authority to promulgate the rules.

3. The Court below also found that Rules 2 and 3 were inconsistent with earlier Commission and court decisions

to the effect that a motor carrier may not act as a shipper free from discrimination. It should be noted initially that no provision of the Act prohibits a motor carrier from acting as a shipper entitled to equal treatment along with other shippers. The Court relied upon the Commission's decision in *Substituted Freight Service*, 232 I.C.C. 683 (1939), in which the Commission said:

> "To act as a common carrier by motor vehicle and as a shipper by rail as to the same service is * * * repugnant to the Act."

The Court said that this interpretation of the Act had been confirmed "in an unbroken line of Commission decisions, in judicial precedent, and in executive and legislative understanding" and therefore that there was "no room for the Commission to alter the settled meaning." (Appendix, page 51) In finding the Commission's decision in *Substituted Freight Service* controlling, the Court ignored the careful examination of this decision by the Commission at 322 I.C.C. 301, 332-334. There the Commission demonstrated that the conclusion that a person may not be both a shipper and carrier with respect to the same service was unnecessary to the determination of the case, explaining that this language was directed at the use of open-tariff service by a carrier not acting in the proper role of carrier, but acting instead as a shipper or forwarder. The Court also ignored the fact that the Commission in the *Substituted Freight Service* case cited no authority whatsoever for its conclusion that it is repugnant to the Act for a motor carrier to act as a common carrier by motor vehicle and shipper by rail as to the same service.

The Court regarded the earlier case of *Trucks on Flatcars Between Chicago and Twin Cities*, 216 I.C.C. 435, where a contrary result had been reached, as being overruled by *Substituted Freight Service*. Of the cases cited by the Court as constituting the "unbroken line of decisions of the Commission" following the Commission's holding in *Substituted Freight Service*, only *Movement of Highway Trailers by Rail* (the so-called *New Haven* case), 293 I.C.C. 93 (1954) involved a consideration of the entire field of TOFC transportation. The Commission's decision in the *New Haven* case, a decision rendered without a factual record and at a time when the tremendous growth in TOFC service was only beginning, should not prevent the Commission from carrying out its stated purpose of re-examining existing precedents and practices so that the Commission might adopt rules and regulations "necessary to regulate coordinated and substituted service transportation in the public interest." 322 I.C.C. 301, 303.

Having re-examined the entire scope of TOFC service on a factual record, the Commission should be allowed to reconsider, reappraise and update its interpretation of the provisions of the Interstate Commerce Act in the light of existing transportation circumstances. It is well established law that an administrative agency is not precluded by an initial interpretation of an Act from changing this interpretation subsequently. See discussion in 2 *Am. Jur.* 2d Par. 236-40 (Pages 63-66), and cases cited therein. Therefore, the question is whether or not such substantial changes have occurred in the national transportation system to justify a re-examination of these initial interpretations.

TOFC service is a unique development in the transportation system. It is a hybrid of rail transportation and motor

transportation; therefore, it cannot be pigeon-holed into one of the separate modes of transportation under which the District Court demands that it be characterized. The Court erred when it ignored the inherent nature of all TOFC service, regarding it as rail service and consequently regarding the question as being whether or not the motor carrier "could lawfully avail themselves of this service." (Appendix, Page 40.)

The Commission recognized that all TOFC service is inherently bimodal. In answering the argument of certain rail carriers that the proposed rules would allow motor carriers to "exploit" the railroads' "acknowledged inherent advantages," the Commission said the following:

> "What they overlook is that *all* TOFC service is inherently bimodal in that its basic characteristic is the combination of the inherent advantages of rail and motor transportation: The railroad's ability to provide efficient line-haul transportation of huge volumes of freight for great distances at high speeds; and the motor carrier's ability to provide door-to-door and, if necessary, job- or farm-site pick up and delivery." 322 I.C.C. 301, 329.

Thus, the Commission recognized what the Court refused to recognize—that motor carriers utilizing TOFC service do not "exploit the inherent advantages" of railroads any more than railroads "exploit the inherent advantages" of motor carriers. What the Commission sought to do was to foster the development of the combination rail-motor service which utilizes the inherent advantages of each of the different modes of transportation. The Court below would thwart this effort by insisting that all transportation must fall within a particular compartment under the Act or constitute a voluntary through route under Section 216(c) of the Act. The latter argument will be considered

in a moment; first it should be noted that if each mode of transportation is limited to the movement of for-hire transportation by that particular mode, then the railroads should not be able to utilize bimodal service except with the establishment of a through route, either. A railroad engaging in TOFC service utilizes a highway vehicle to achieve its door-to-door movement without the transfer of lading; therefore, it does not confine itself to "railroad transportation."

4. The Court below held that the exclusive method for providing a coordinated service between motor carriers and rail carriers was by establishing through routes and joint rates pursuant to Section 216(c) of the Act. In so holding, the Court ignored the definition of a through route and disregarded transportation practices approved by the Commission for many years. The Commission has defined a through route as "a continuous line of railway formed by an arrangement, express or implied, between connecting carriers." *Through Routes and Through Rates*, 12 I.C.C. 163, 168 (1907). This Court considered the definition of a through route in *Thompson v. United States*, 343 U.S. 549 (1952), and set out the following test (at page 557):

> "In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service."

When a motor carrier tenders a shipment under a rail open tariff, the railroad is not holding itself out as offering a through transportation service. The holding out in its bill of lading covers only the portion of the movement under the open-tariff provision, and the railroad is subject to no contractual liability to the original shipper. All that

is provided for under the rules regarding open-tariff service is the substitution of rail TOFC service by a motor carrier for a portion of the motor carrier's operation.

Through all the years of rail carriage, the railroads have used vehicular equipment other than rail cars as a part and parcel of railroad service without the necessity of establishing through routes and joint rates. They have treated the entire transportation operation as a rail operation, rather than as a through route, joint rate arrangement. The Commission has long recognized the legality of this rail carrier substitution of motor carrier service without the necessity of establishing through routes and joint rates. In Rules 2 and 3 which it has promulgated, the Commission has attempted to provide that motor carriers in a similar manner may substitute rail service for a portion of their overall motor carrier service. The Commission's purpose was to make coordinated motor carrier-rail carrier service available to the shipping public in the interest of efficient and economical transportation. Under the District Court's holding, however, no coordination of motor carrier service and rail carrier service is possible without the establishment of through routes and joint rates under Section 216(c) of the Act. The result is that the rail carriers are in a position to eliminate all coordinated service by refusing to enter into through route, joint rate arrangements with any motor carrier. This establishes inequality as to the use of coordinated service by rail carriers and motor carriers, and it discourages the use of such service, contrary to the public interest.

5. Having concluded that the only valid coordinated motor-rail service would be a through route arrangement, the Court below concluded that Rules 2 and 3 violated Section 216(c) of the Act because they are compulsory. Obviously, Section 216(c) is permissive only, but since

a through route situation is not involved here (see discussion in Part 4, *supra*), there is no question of compulsion under Section 216(c). In addition, none of the rules promulgated by the Commission in *Ex Parte No. 230* compels the rail carriers to publish any rate arrangements whatsoever. The holding out by the railroads under Plan III of a terminal-to-terminal service is entirely voluntary on the part of the railroads. Consequently, the only question of compulsion is whether a railroad, having voluntarily elected to hold out an open-tariff service, may be compelled to hold out a service to all of the public on equal terms or whether it may select only that segment of the public which it chooses to serve. The railroads' apparent intent is to limit the service offered so as to make it economically feasible for them to offer the shipping public an attractive rate and thus attract more business. Since the rates are published to attract traffic, it is difficult to understand why the railroads are so vigorously opposed to the tender of any such traffic to them by motor carriers, unless the railroads seek to establish a monopoly, not only of the available traffic, but also of the decisional power to determine under what circumstances the traffic will be accepted.

6. The District Court also found that the open-tariff rules promulgated by the Commission were in conflict with the freight forwarder provisions in Part IV of the Act. In so holding the Court erred, because as long as the motor carrier is performing assembly and distribution *as a motor carrier* he is excluded from the definition of "freight forwarder" in Section 402(a)(5) of the Act, 49 U.S.C. 1002 (a)(5). The Court ignored the fact that assembly and distribution of small-lot shipments are not uniquely attributes of freight forwarders and are functions also performed by the railroads for many years with Commission approval. The Court also erroneously assumed that a motor carrier operating or utilizing bimodal TOFC service is not operating as a motor carrier.

CONCLUSION

In holding that the rules promulgated by the Commission were invalid, the District Court refused to examine the nature of the TOFC service itself. Declaring that "These rules break new ground," (Appendix, page 32), the District Court looked for some express statutory provision which had been interpreted by the Commission in the past as authorizing coordinated motor-rail service without the establishment of a through route under Section 216(c). Thus, the District Court ignored the revoluntionary development in the activities which the Commission by its rules must regulate. The Commission should not be foreclosed by its decision in *Movement of Highway Trailers by Rail,* 292 I.C.C. 93 (1954) from acting in response to this development. In that case the Commission, without a record of past TOFC operations, approved railroad use of TOFC. Through the use of TOFC service, the railroads have been able to provide a service predicated upon door-to-door movement of freight in the same vehicle. But by limiting rail service under Plan III to a terminal-to-terminal operation and thus fostering provision of private carriage in the necessary highway pick-up and delivery service, the railroads have been able to put the motor carriers in a position of competitive disadvantage. *Movement of Highway Trailers by Rail* has thus allowed the railroads to bar motor carrier use of this service at their will. The rules promulgated by the Commission, adopted after a careful examination of the entire scope of TOFC service upon a factual record, provide only that this invaluable rail-motor service will be equally open to railroads and motor carriers. Not only is this the only equitable arrangement between the railroads and motor carriers, but it is also

the arrangement which the Commission has found will do the most to encourage coordinated motor-rail service in the public interest.

For the foregoing reasons, the questions presented upon this appeal are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution. Upon consideration of the questions on their merits, Appellant, National Automobile Transporters Association, urges that the judgment of the District Court be reversed and the case remanded to that Court for disposition consistent with this Court's opinion.

Respectfully submitted,

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